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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 606

THE STATE OF MISSOURI on the Information of JOHN C. DANFORTH, Attorney General,
Petitioner,

vs.

J. B. "JET" BANKS,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Missouri together with two concurring and one dissenting opinion are reported in 454 S. W. 2d 498.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Where the Constitution assigns a particular function wholly and indivisibly to another department, namely, the Legislative Department, can the judiciary intervene?

Also, can a party complain of violation of the equal protection clause where no showing has been made that anyone comparably situated has been treated differently?

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

ARTICLE I

Quorum; journals; adjournments

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as Each House may provide . . .

Constitution of Missouri

ARTICLE III

Section 4. Qualifications of representatives.—Each representative shall be twenty-four years of age, and next before the day of his election shall have been a qualified voter for two years and a resident of the county or district where he is chosen to represent for one year, if such county or district shall have been so long established, and

if not, then of the county or district from which the same shall have been taken.

Section 18. Appointment of officers of houses—jurisdiction to determine membership—power to make rules, punish for contempt and disorderly conduct and expel members.—Each house shall appoint its own officers; shall be sole judge of the qualifications, election and returns of its own members; may determine the rules of its own proceedings, except as herein provided; may arrest and punish by fine not exceeding three hundred dollars, or imprisonment in a county jail not exceeding ten days, or both, any person not a member, who shall be guilty of disrespect to the house by any disorderly or contemptuous behavior in its presence during its sessions; may punish its members for disorderly conduct; and, with the concurrence of two-thirds of all members elect, may expel a member; but no member shall be expelled a second time for the same cause.

ARTICLE II

Three departments of government—separation of powers

1. The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collections of persons, charged with the exercise of powers properly belonging to one of these departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

STATEMENT OF THE CASE

The respondent was duly elected to the Missouri House of Representatives on November 5, 1968, as Representative from the 54th Legislative District. His election was cer-

tified by the Secretary of State of Missouri. The oath of office was duly administered to him, he was seated and established tenure of office as Representative of the 54th District of the House of Representatives of Missouri.

Petitioner filed an Information in the nature of Quo Warranto. Respondent filed a Motion to dismiss the Information, on the ground that the court lacked jurisdiction over the subject matter. The Motion was taken under advisement and a Return was filed.

The Supreme Court of Missouri sustained the Motion to Dismiss on the basis that the State Constitution constituted the House of Representatives "sole Judge" of the election and qualifications of its members.

The court further held that the Legislature in administering the oath of office to respondent and seating him resolved any question of qualification in his favor, and that there was no indication of "inaction" on the part of the Legislature. The majority opinion found no claim of "arbitrary or discriminatory failure to apply uniform standards" or of "invidious discrimination" so as to constitute a violation of the equal protection clause.

The majority opinion further held, in the instant case, "inaction" has neither been alleged nor proven and that from the record before the court, there was no showing that the Legislative Body neglected its Constitutional duty and failed to act in the premises.

There were two concurring and one dissenting opinion.

The Motion for rehearing was filed and a Motion opposing same was filed, the latter demonstrating that the court had resolved the "equal protection point" and that the court's decision was correct.

The Motion for rehearing was denied and the present petition followed.

It is necessary to correct an inaccuracy contained in the third sentence of the initial paragraph of petitioner's Statement of the Case. The record in the case at bar does not show that any member of the House of Representatives did or did not call the attention of the House to any question concerning respondent's right to sit. In fact, the entire record as set out in the various opinions of the Missouri Supreme Court shows complete silence in either allegation or proof by petitioner of what did or did not transpire in the Missouri House of Representatives concerning this question.

ARGUMENT

I

The Decision Below Is Clearly Correct

By enactment of Article III, Section 18 of the Constitution of Missouri, as found by the Supreme Court of Missouri, the people have specifically made a "textually demonstrable constitutional commitment" to its House of Representatives power to be the sole judge of the qualifications of its own members.

The Supreme Court of Missouri relied on the recent decision of the Supreme Court of the United States, Baker v. Carr, 369 U. S. 186, wherein it was determined that the "political question doctrine" would make non-justiciable cases wherein there was found "a textually demonstrable constitutional commitment" of an issue to a coordinate political department.

The Supreme Court of Missouri further found that an attempt to exercise powers specifically delegated to the Legislative Department would constitute an encroachment upon the Legislature by the Court and do violence to the separation of powers vital to our form of government.

The decision of the Supreme Court of Missouri was further correct in that it recognized the principle that legislative bodies are the sole judge of the qualifications of their members; that in the Constitution of the Federal Government and virtually all the states this sound principle exists, is of ancient origin, and was traced by the Court to the Constitutional Law of England in the year 1586. Hiss v. Bartlett, 69 Mass. 468, 473, 63 Am. Dec. 768; State ex rel. Acker v. Reeves, 229 Ind. 126, 95 N. E. 2d 638; French v. State Senate, 146 Cal. 604, 80 Pac. 1031; Reif v. Barrett, 385 Ill. 164, 182 N. E. 899; Bowling v.

Weakley, 181 Md. 498, 30 A. 2d 701; Preisler v. Doherty, 364 Mo. 998, 268 S. W. 2d 494.

The lower court further found that in Baker v. Carr, 369 U. S. 186, it was held that "where the Constitution assigns a particular function wholly and indivisibly to another department, the Federal Judiciary does not intervene".

The Missouri Supreme Court further found that in Powell v. McCormack, 395 U. S. 486, it was said:

> "Contests may arise over whether an elected official meets the qualifications of the Constitution, in which event the House is the sole judge".

The Court correctly found that the Information failed to state a justiciable cause of action.

Concurring opinions of the Missouri Supreme Court correctly found that no violation of the equal protection clause of the 14th Amendment to the Constitution of the United States has been shown and in fact that no violation or "inaction" had either been alleged or proved by petitioner.

II

There Is No Conflict of Decision

Nowhere in the petition for Writ of Certiorari is there any showing of a conflict of decision.

In fact the majority opinion of the Missouri Supreme Court traced an uninterrupted line of decisions dating back over three centuries, including United States Supreme Court and numerous State Supreme Courts.

Petitioner concedes that there is no judicial precedent on the specific issue submitted and cites no decision that might or could be in conflict with that of the Supreme Court of Missouri.

III

There Is No Important Question of Federal Law

Petitioner insists that there lurks an important question of Federal Law which this Court should settle. Strangely, there is no citation, nor any pending litigation, no indication other than for approximately two centuries the Federal Constitution has specifically delegated the power to each House, to judge the qualifications of its members. Petitioner does not contend any of the states having virtually the same provisions regarding the Legislature being the sole judge of the qualifications of its members, has rendered any contrary decision.

In fact the recent decisions of **Baker** v. **Carr**, *supra*, and **Powell** v. **McCormack**, *supra*, clearly held that the assignment of a particular function in the Constitution to another department prohibits the Judiciary from intervening, also deciding that contests arising concerning elected officials' qualifications were to be decided solely by the House. Petitioner seeks to burden this court with a question whose principle is steeped in ancient origin and has been consistently upheld and recently endorsed by this Supreme Court.

It appears that petitioner is pressed into strained thinking in an effort to make the 14th Amendment to the Constitution of the United States apply to any and all questions, situations and controversies. Specifically in this case his contention is directed against Article I, Section 5 of the Constitution of the United States, as well as similar provisions in the Constitutions of virtually all of the sovereign states.

In any event, the record in the case at bar exhibits no allegations, no facts, no evidence, and no proof of what proceedings were or were not held in the House of

Representatives of the State of Missouri concerning this matter, but rather the record is totally silent on this point.

In addition, the record is also completely silent as to allegations, evidence, facts or proof as to what measures or proceedings were conducted to test the qualifications of the other 162 members of the House of Representatives of Missouri. Further, the record in no way alleges, establishes or proves that the qualifications of any other member of the House of Representatives were tested in any different manner or by any different standards than those of respondent. This court in National Union of Marine Cooks and Stewards v. Arnold et al., 348 U. S. 37, at page 41, held as follows:

> "We have no difficulty with the equal protection clause because no showing has been made that anyone comparably situated has been treated differently from petitioner".

Petitioner should not be permitted to pit the United States Supreme Court against the Congress and Senate and the Legislatures of all the various states in an area in which the Federal Constitution and all the State Constitutions specifically delegated the power to the legislative bodies to judge the qualifications of their own members.

IV

Loss of Jurisdiction by Mootness

Respondent advises the court of certain facts which in respondent's view renders this cause moot. This court has constitutional jurisdiction only over actual cases and controversies, between adverse intepests with respect to which the court's judgment will be effective.

In the instant case respondent's term of office will expire on December 31, 1970. At that time, the controversy will have become academic by reason of the changed circumstances, and the court's jurisdiction will have ceased. Obviously, it appears well nigh impossible for the court to render a judgment which will be effective prior to December 31, 1970, on which date respondent's term in office will have ended.

Petitioner has no standing to request that this court issue advisory opinions on the questions presented for use in possible future situations.

In other words, petitioner is seeking to invoke the Certiorari jurisdiction of this court on what will shortly become an abstract question. This he may not do.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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